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Supreme Court of the United States

No. 263

UNITED STATES OF AMERICA
(APPELLANT BELOW),

VS.

JOSEPH F. BENT AND WILLIAM AMOS JONES,
PETITIONERS (APPELLEES BELOW).

PETITION FOR REVIEW ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

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INDEX

Opinion Below 2
Summary and Short Statement of Matters Involved, Including Statute Involved 2
Jurisdictional Statement 5
Questions Presented and Errors to Be Urged 8
Reasons Relied On for Allowance of Writ of Certiorari 9
Conclusion 15

Cases Cited

Allen vs. U. S., (4 Cir.) 89 F. 2d 954 7
Asgill vs. U. S., (4 Cir.) 60 F. 2d 780, 784 7
Blackwood vs. U. S., (8 Cir.) 130 F. 2d 461, 462, 463 11
Dealy vs. U. S., 152 U. S. 539, 14 S. Ct. 680, 681 7
DeJianne vs. U. S., (C. C. A. N. J.) 43 F. 2d 353 7
Dunn vs. U. S., 284 U. S. 390, 393 7
Goulson vs. U. S., 16 F. 2d 44 8
Hagner vs. U. S., 285 U. S. 427, 431, 432, 433 8
Harris vs. U. S., (8 Cir.) 104 F. 2d 41, 43-45 ..... 8, 11, 12
Hewitt vs. U. S., (8 Cir.) 110 F. 2d 1 8
Hood vs. U. S., 43 F. 2d 353, 354 7
McClintock vs. U. S., (C. C. A. Kan.) 60 F. 2d 839, 840 7
Michener vs. U. S., 170 F. 2d 973, 975 ..... 4, 8
Murphy vs. U. S., 133 F. 2d 622 7
Myers vs. U. S., 15 F. 2d 977, 985 ..... 4, 8
Pettibone vs. U. S., 197, 202, 13 S. Ct. 542, 545, 37 L. Ed. 419 7
Samuels vs. U. S., 152 U. S. 539, 14 S. Ct. 680, 681 7
Selvester vs. U. S., 170 U. S. 262, 263, 18 S. Ct. 680, 681 7
Sutton vs. U. S., 157 F. 2d 661 8
U. S. vs. Cook, 17 Wall. 174, 21 L. Ed. 538 7

U. S. vs. Costner, (4 Cir.) 139 F. 2d 432 10
U. S. vs. Eisenminger, 16 F. 2d 816 8
U. S. vs. Grant, (D. C. E. D. Mich.) 1 F. 2d 723 7
U. S. vs. Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588 7
U. S. vs. Hess, 124 U. S. 483, 486, 8 S. Ct. 571, 31 L. Ed. 516 7
U. S. vs. Hunter, (C. C. A. Ohio) 149 F. 2d 710 10
U. S. vs. McKay, 45 F. Supp. 1007 8
U. S. vs. Mills, 7 Pet. 142, 8 L. Ed. 636 7
White vs. U. S., 67 F. 2d 71 7
Williams vs. U. S., 151 F. 2d 736, 168 U. S. 382, 389 7

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PETITION FOR REVIEW ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

To the United States Supreme Court, and the Honorable Judges Thereof:

Come now the petitioners, JOSEPH F. BENT and WILLIAM AMOS JONES, and pray that a writ of certiorari be issued to review a decree of the Circuit Court of Appeals for the Eighth Circuit (Case No. 13906) entered in this Cause rendered June 20, 1949 (R. 24), and became final July 14, 1949 (R. 31), said order reversing an order of the United States District Court for the Western Division, Western District of Missouri that was rendered December 3, 1948 (R. 10), setting aside judgment and sentence of petitioners rendered against petitioners on July 10, 1946, on Count 2 of their indictment.

OPINION BELOW.

Circuit Court of Appeals' Opinion, not yet officially reported, but appears R. 14-23. Opinion and order of District Court for Western Division of Western District of Missouri (R. 6-10).

SUMMARY AND SHORT STATEMENT OF MATTERS INVOLVED, INCLUDING STATUTE INVOLVED.

Petitioners were indicted on May 28, 1946, in the United States District Court For The Western Division Of The Western District Of Missouri, Case No. 16463, in three Counts: COUNT I, for robbing a clerk in charge of a Post Office; COUNT II, by use of a dangerous weapon, putting in jeopardy the life of the clerk; and COUNT III, for conspiring to rob the clerk in charge of the Post Office (R. 6). Their indictment was under Sec. 320, Title 18, U. S. C. A., which Section Number was endorsed at the top of the Indictment but not cited for Count II or Count III of the Indictment.

SECTION 320 is as follows:

(Ch. 694, 49 Stat. 867)—(now Sec. 2114, New Title 18, U. S. C.)

"Whoever shall assault any person having lawful charge, control, or custody of any mail matter, with intent to rob, steal or purloin such mail matter or any part thereof, or shall rob any person of such mail matter or any part thereof, shall, for a first offense, be imprisoned not more than ten years; and *if in effecting or attempt to effect such robbery* (italics ours), he shall wound the person having custody of the mail, or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years" (R. 16).

COUNT II of the Indictment, which is a matter for the consideration of the Court in this Petition For Review, stated:

> "The Grand Jury Further Charges:
>
> That on or about the 2nd day of January, 1946, at Kansas City, Missouri, Joseph F. Bent and William Amos Jones did, by the use of a dangerous weapon, put in jeopardy the life of Luther H. Kieffer, Clerk in charge of Contract Station No. 44 of the Kansas City, Missouri, Post Office, located at 5744 Prospect" (R. 8).

On June 20, 1946, upon arraignment, the Petitioners entered pleas of not guilty to all counts, and the case was set for trial on July 8, 1946. On the day of the trial, Petitioners Bent and Jones withdrew their pleas of not guilty and entered pleas of guilty as to Counts I and III, leaving the plea as to Count II open until after the trial of Collins, and waived trial by Jury as to Count II. Collins (who is not involved in this Petition For Review) was tried on July 8, 1946, by the Court, and discharged on all three counts. Thereafter, Petitioners Bent and Jones entered please of guilty to Count II (R. 7), and on July 9, 1946, were found guilty by the Court of "putting in jeopardy by use of a dangerous weapon the life of a clerk in charge of a Post Office Contract Station, charged in Count II" (R. 3), and were sentenced on Count II to twenty-five years in prison. Petitioners, at the same time, were sentenced to one year and one day each on Counts I and III, to which they had previously pleaded guilty (R. 4).

On September 13, 1948, Petitioner Bent filed a Motion To Correct Sentence under Title 28, Sec. 2255, U. S. C. A., and his grounds for said Motion stated (R. 5, 6, 8):

> "(1) That the sentence imposed on Count II of the Indictment is illegal.

(2) That the Court had no jurisdiction to try this Defendant on Count II of said Indictment.

(3) That said Count II stated no offense against the United States."

On December 3, 1948, Judge R. M. Duncan, of The District Court Of The United States For The Western Division Of The Western District Of Missouri, vacated judgment and sentence under Count II of the Indictment as to both Petitioners, on the ground that Count II of the Indictment was fatally defective and charged no offense against the United States because it was defective in substance in failing to allege that the life of the postal clerk was placed in jeopardy *"in effecting or attempting to effect such robbery"* (Italics ours) (R. 9, 10).

Citing:

Michener v. *U. S.*, 170 F. 2d 973, 975, with approval from *Myers* v. *U. S.*, 15 F. 2d 977, 985.

"If the indictment or information fails to allege any matter of substance, that is, any material ingredient of the crime, it is fatally defective."

Both of the cases cited discussed defects in form as provided in Sec. 556, Title 18, U. S. C. A., concluding that said Section related solely to defects of form and not to defects of substance.

On December 31, 1948, the United States District Attorney filed a Notice Of Appeal to the United States Court Of Appeals For The Eighth Circuit. Subsequently, Petitioners and the Government submitted Briefs (R. 10, 11, 12).

On June 20, 1949, the United States Court Of Appeals, Eighth Circuit, reversed the Order of Judge Duncan, stating:

> "The Second Count, standing alone, was concededly defective in failing to allege that the defendants, *in effecting the robbery charged in the First Count* (italics ours), put the life of the custodian in jeopardy by the use of a dangerous weapon" (R. 20).

and that though Count II was defective in failing to allege a material ingredient of the crime, namely: that the postal clerk's life was put in jeopardy by use of a dangerous weapon, *"in effecting or attempting to effect a robbery"* (Italics ours), said lack of a material essential allegation necessary to constitute any crime was merely a defect in form and not of substance (R. 20, 21, 22).

A Motion For Re-hearing was timely filed by Petitioners, the Court overruling the Motion on July 14, 1949 (R. 31).

Notice And Motion To Stay Issuance Of Mandate, and Notice Of Filing Petition For Review were filed by Petitioners on July 21, 1949, and Order Staying Issuance Of Mandate was filed by the Court on July 22, 1949 (R. 31, 32).

JURISDICTIONAL STATEMENT.

Petitioners invoke the jurisdiction of the court under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and also invoked under the Rules of Practice and Procedure, promulgated May 7, 1934, pertaining to procedure after plea of guilty, verdict or finding of guilt, in criminal cases brought in the District Courts of the United States. The judgment and decree of the Circuit Court of Appeals for the Eighth Circuit was rendered June 20, 1949 (R. 24), and order denying motion for rehearing was rendered July 14, 1949 (R. 31). This Petition for Writ of Certiorari is being filed on or before August 13, 1949.

This court has jurisdiction to issue the Writ of Certiorari herein requested for the reason that the decree and judgment of the Circuit Court of Appeals is in direct conflict with the decisions of this, The United States Supreme Court, is in conflict with the decisions of the Circuit Courts of Appeals for the various circuits hereinafter set out, by case citation, and in direct conflict with the decisions of the Court of Appeals for the Eighth Circuit.

For the sake of brevity we will cite these cases in groups, with the substance of their holdings indicated by group number.

The Circuit Court of Appeals for the Eighth Circuit in the case at bar with reference to Count II of petitioners' indictment, which is the subject for consideration here before the court:

> "The Second Count, standing alone, was concededly defective in failing to allege that the defendants, *in effecting the robbery charged in the First Count* (italics ours), put the life of the custodian in jeopardy by the use of a dangerous weapon" (R. 20).
>
> "Despite its defects, we think that count II of the indictment was sufficiently informative, when read in the light of the applicable statute to which the indictment referred, the subject matter of the other counts, and the indictment as a whole, to support the sentences imposed upon the defendants" (R. 20).

By the ruling above quoted, together with the entire substance of the Opinion of the court, the Court necessarily held that the omission from the indictment of an essential element of the crime was a defect in form and not a defect in substance, and further that in determining on collateral attack, whether a count of an indictment charged an offense, each count of an indictment is not considered as if it were a separate indictment charging a distinct separate offense.

By so ruling, the Court erred and brought its Opinion into direct conflict with the following decisions:

[1]holding: In determining the sufficiency of a count of an indictment, each count must be treated as a separate indictment and not merely a part of the indictment in which it is found, and each count of an indictment must be sufficient within itself to support a conviction.

[2]in speaking of a specific count of an indictment, and using the word indictment as indicative of the specific count being considered, holding: All the material facts and circumstances embraced in the statutory offense must be stated in the indictment, or indictment will be defective and no essential element of the crime can be omitted without destroying the whole pleading (destroying the whole pleading referring obviously to the particular count of the indictment under consideration). The omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially or by way of recital. Every ingredient of which the crime is composed must be clearly and accurately alleged.

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[1]*Dunn* v. *U. S.*, 284 U. S. 390, 393; *Selvester* v. *U. S.*, 170 U. S. 262, 263, 18 S. Ct. 580, 581; *Dealy* v. *U. S.*, 152 U. S. 539, 14 S. Ct. 680, 681; *Samuels* v. *U. S.*, 232 Fed. 536, 540; *Hood* v. *U. S.*, 43 F. 2d 353, 354; *McClintock* v. *U. S.*, (C. C. A. Kan., 1932) 60 F. 2d 839, 840; *DeJianne* v. *U. S.*, (C. C. A. N. J.) 43 F. 2d 353; *U. S.* v. *Grant*, (D. C. E. D. Mich.) 1 F. 2d 723; *Asgill* v. *U. S.*, (C. C. A. Va., 4th Cir.) 60 F. 2d 780; *Williams* v. *U. S.*, 151 F. 2d 736, 168 U. S. 382, 389; *Murphy* v. *U. S.*, 133 F. 2d 622; *Allen* v. *U. S.*, (4th Cir.) 89 F. 2d 954.

[2]*White* v. *U. S.*, 67 F. 2d 71; *Pettibone* v. *U. S.*, 148 U. S. 197, 202, 13 S. Ct. 542, 545, 37 L. Ed. 419; *Asgill* v. *U. S.*, (4th Cir.) 60 F. 2d 780, 784; *U. S.* v. *Hess*, 124 U. S. 483, 486, 8 S. Ct. 571, 31 L. Ed. 516; *U. S.* v. *Cruikshank*, 92 U. S. 542, 558, 23 L. Ed. 588; *U. S.* v. *Mills*, 7 Pet. 142, 8 L. Ed. 636; *U. S.* v. *Cook*, 17 Wall. 174, 21 L. Ed. 538.

[3] in speaking of one count of a multiple count indictment holding: Where the challenge is based upon an omission in the averments thereof, of an essential element of a crime, objection thereto is not waived. The defendant may raise the question at any time on collateral attack, or after verdict for the first time, or after a plea of guilty. A defendant cannot waive lack of jurisdiction of subject matter. Sec. 556, T. 18, U. S. C., relates solely to defects in matters of form and does not change the rule which requires that the essential elements of an offense must be alleged.

QUESTIONS PRESENTED AND ERRORS TO BE URGED.

The United States Circuit Court of Appeals, 8th Circuit, conceded:

> "The Second Count, standing alone, was concededly defective in failing to allege that the defendants, *in effecting the roberry charged in the First Count* (italics ours), put the life of tne custodian in jeopardy by the use of a dangerous weapon" (R. 30).

Therefore, the error to be urged is: The Court erred in holding that the entire omission in Count II of an essential element of the crime apparently sought to be charged in Count II was merely a defect in form and not a defect of substance, the Court holding that this lack of substance could be supplied by inference from Count I.

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[3] *Harris* v. *U. S.*, (8th Cir.) 104 F. 2d 41, 43-45; *Michener* v. *U. S.*, 170 F. 2d 973, 975; *Hagner* v. *U. S.*, 285 U. S. 427, 431, 432, 433; *Myers* v. *U. S.*, 15 F. 2d 977, 985; *U. S.* v. *McKay*, 45 F. Supp. 1007; *Hewitt* v. *U. S.*, (8th Cir.) 110 F. 2d 1; *U. S.* v. *Eisenminger*, 16 F. 2d 816; *Goulson* v. *U. S.*, 16 F. 2d 44; *Sutton* v. *U. S.*, 157 F. 2d 661.

The questions presented are:

(1) Does Sec. 320, Title 18, U. S. C. A., define such a crime as "putting the life of a postal clerk in jeopardy by the use of a dangerous weapon"?

(2) Was any offense charged in Count II of the Indictment, other than: "putting the life of a postal clerk in jeopardy by the use of a dangerous weapon"?

(3) Even on a collateral attack, or an attack after a plea of guilty, must not a count of an indictment in and of itself contain the essential elements necessary to charge some offense, in order that that count might validly support a conviction and sentence?

(4) Did Petitioners, after their conviction on their plea of guilty to Count I, on July 8, 1946, by subsequently pleading not guilty to Count II and submitting themselves for trial on Count II, waive their Constitutional right (Const. Amendments V and VI) to set up as a defense to jurisdiction of the Court of Count II that they had previously been put in jeopardy by being convicted on Count I, where the record, as in this case, of itself and on its face, shows such facts to exist?

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI.

The Court conceded the fact that an essential element of an aggravated postal robbery was completely omitted from Count II. Count II omitted any reference to Count I, and omitted any allegation that it was in connection with a robbery or attempted robbery of a postal clerk in which Petitioners put the life of the postal clerk in jeopardy by the use of a dangerous weapon. Since the Court has conceded that this is a material allegation of fact, only one

conclusion can be reached, and that is, that the Trial Court had no jurisdiction to try, convict and sentence Petitioners on Count II, for Count II stated no offense against the United States. It was completely lacking in substance necessary to charge an aggravated form of postal robbery.

We feel that Judge Duncan, of the District Court, in his Opinion (R. 9, 10), very clearly analyzed the defect in Count II of the Indictment in question; that he analyzes it much better than we ourselves could do. Therefore we wish to quote from Judge Duncan's Opinion, as follows, and refer to the cases we believe Judge Duncan had in mind at the time he wrote his Opinion:

> "Sec. 320, Title 18, U. S. C. A., defines two offenses: one of assault with intent to rob; and the other, robbery of any person of mail matter. Upon conviction for either offense a defendant may be imprisoned for not more than 10 years. If in effecting or attempting to effect such robbery he shall wound the person having charge of such mail or shall put his life in jeopardy then his sentence shall be increased to 25 years.
>
> That part of the section which requires the penalty to be increased if the custodian is wounded or his life placed in jeopardy with a dangerous weapon while attempting to effect the robbery, does not create a new offense. It simply defines the conditions under which the penalty for one of the other offenses, that of robbery or attempted robbery, shall be increased. In the count under attack here it was sought to make of that part of the section a separate charge, which the statute does not authorize."[4]
>
> "Had the first count of the indictment, which charged the defendants with robbery, contained the

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[4]*U. S.* v. *Hunter*, (C. C. A. Ohio) 149 F. 2d 710; *U. S.* v. *Costner*, (4th Cir.) 139 F. 2d 432.

further charge that in effecting or attempting to effect such robbery the life of the custodian was placed in jeopardy by means of a deadly weapon, then it would have supported a sentence of 25 years,[5] but that is not the fact here. In the first count defendants were charged with robbery only and to that charge they entered a plea of guilty and were sentenced for periods within the time fixed by the statute."

"But even assuming that placing the life of the custodian in jeopardy with a deadly weapon while effecting or attempting to effect a robbery is a separate offense (with which assumption the courts disagree), the charge would still be defective because it fails to charge the most important element of the crime, that is, that his life was placed in jeopardy by the use of a dangerous weapon 'in effecting or attempting to effect such robbery.' Here he was charged with and convicted of putting in jeopardy the life of the clerk by use of a deadly weapon. Under the statute no crime was charged.

Defendants did not raise the question by way of motion to dismiss the indictment or objection to introduction of evidence. The defect in the indictment was not raised until this motion was filed on September 13, 1948. There being no crime charged against the defendants,[6] they did not waive their rights by their failure to make timely objections. It may be done at any time. The defect was one of substance and not of form.

In a very recent case, *Elliott W. Michener* v. *United States of America*, decided November 2, 1948, Judge Riddick of the 8th Circuit cites with approval from *Myers* v. *United States*, 15 F. 2d 977-985, the following:

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[5]*Blackwood* v. *U. S.*, (8th Cir.) 130 F. 2d 461, 462, 463.

[6]See cases cited in Footnotes 1 and 2 of our "Jurisdictional Statement"; and particularly *Harris* v. *U. S.*, 104 F. 2d 41, 43-45.

> 'No indictment found and presented by a grand jury * * * shall be deemed insufficient, nor shall a trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.' (Citing U. S. C., Sec. 556).

and further that:

> 'If the indictment or information fails to allege any matter of substance, that is, any material ingredient of the crime, it is fatally defective. * * *'

> The count under which defendants were sentenced was fatally defective and did not charge any offense against them."[7]

In conclusion, Petitioners urge: (1) That Count II of the Indictment stated no offense against the United States; (2) That the Court had no jurisdiction to try, convict and sentence defendants to 25 years in prison on Count II; (3) That any defendant has the right to contest lack of jurisdiction of the court, where on the face of the court's own record it affirmatively shows that the Court did not have jurisdiction and affirmatively shows that the indictment, judgment and sentence based thereon was illegal; (4) That the District Court did not abuse its jurisdiction in recognizing a plain error in the Indictment, and that the Circuit Court of Appeals had no valid authority to reverse the District Court's Order, where the District Court violated no provision of the law in exercising its discretion; (5) That based upon the Circuit Court of Appeals' own method of gauging the sufficiency of Count II, namely: reading Count II in the light of the applicable statute to

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[7]*Harris* v. *U. S.*, 104 F. 2d 41, 43-45; and see also: Other cases cited under Footnotes 1 and 2 of our "Jurisdictional Statement."

which the indictment apparently referred, the subject matter of the other counts, and the indictment as a whole (R. 22), Count II stated in substance nothing but that "Defendants put the life of a postal clerk in jeopardy by the use of a dangerous weapon," which is not an offense against the United States. The Indictment was not sufficiently informative, even when gauged by the rules which the Circuit Court of Appeals used, because Count II was not sufficiently informative to apprize Petitioners of the crime with which they were charged and furnished them no basis for a plea of double jeopardy should they be again tried for an aggravated type of postal robbery. The Count not only misled the Petitioners, but misled the Trial Judge, Judge Collet, as evidenced by his judgment and sentence (R. 3, 4, 5), and misled the Assistant United States District Attorney who prepared the indictment, as evidenced by the contents of his Notice of Appeal (R. 11). Both the Trial Judge and the Assistant United States Attorney were confused as to what Count II charged, as evidenced by the way they expressed what was charged in Count II, shown by the numbered pages of the Record immediately above, *i. e.*: "Defendants having been convicted * * * to-wit: putting in jeopardy by the use of a dangerous weapon the life of a clerk in charge of a Post Office Contract Station, charged in Count II."

If the Court in this case permits the judgment of the Circuit Court of Appeals, Eighth Circuit, in the case at bar, to stand, this decision will completely destroy the very theory of separate counts of an indictment, and defendants could henceforward cite this case as being a completely valid reason for insisting that only one crime is being charged in any indictment, no matter in how many counts it may be drawn, where a violation of the same or similar crime is charged.

This judgment destroys the very purpose of separating an indictment into separate counts. The cases cited by the United States Court of Appeals in the case at bar (R. 20, 21): HAGNER; HEWITT; HARTWELL; WAGONER; ROSE, are based on entirely different defects in the counts of each of the indictments there involved. In each count of each indictment involved in each of those cases, the defect was strictly technical. All of the essential ingredients were alleged in each of the counts under consideration in those cases. The HAGNER case considered a one-count indictment, and the wording used therein, that the indictment could be looked to as a whole, necessarily referred to the one count when the word "indictment" was used therein. The HEWITT case is easily distinguished, in that the essential elements of the crime were alleged in each count, but were merely not defined as accurately as might have been possible. The same circumstances existed in the other cases cited by the Court. In the case at bar, we have an indictment in which Count II is wholly lacking in the essential elements to constitute any offense against the United States, and by no construction can it be said that it does constitute an offense against the United States. Therefore, the Petitioners feel that the Writ of Certiorari should be issued to the United States Circuit Court of Appeals, Eighth Circuit.

CONCLUSION.

It is respectfully submitted that a Petition for Writ of Certiorari should be granted.

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